

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

In Re: Carol Anne Mancini
ISDS Notice of Violation No. CI91-429

AAD No. 91-039/IE

DECISION ON THE DEPARTMENT FOR
ENVIRONMENTAL MANAGEMENT'S MOTION TO DISMISS

Authority

This motion is properly before Hearing Officer Patricia Byrnes pursuant to R.I.G.L. 42-17.1-2, et seq. as amended, 42-17.7-1, et seq. as amended, the Administrative Procedures Act (APA) R.I.G.L. 42-35.1 et seq. as amended, the Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems and the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters Rules.

Background

A notice of violation (NOV) was sent to Carol Anne Mancini on November 13, 1991 which alleged sewage from her septic system had seeped onto the ground surface. The NOV ordered her to take immediate temporary action to alleviate any discharge, to submit an application and plan to remedy the situation and to provide a repair plan application compiled by a registered drain layer, land surveyor or professional engineer. The violation also notified the Respondent that she was entitled to a hearing to contest these allegations.

On November 20, 1991 a request for hearing was filed in the form of a two (2) page letter which stated Carol Anne Mancini was appealing the violation,

cited the appropriate statutory provisions and listed eleven (11) points summarizing her position. This request for hearing was signed "Philip Mancini, Jr., P.E., Chief Engineer".

The Department of Environmental Management (DEM) through its legal counsel filed a Motion to Dismiss asking the Hearing Officer to dismiss this violation in accordance with AAD Rule 8 and Superior Court Rules of Civil Procedure Rule 41 on the grounds that the request for hearing was not properly and timely filed because it was not signed by the Respondent or an attorney acting on her behalf. The State further contends in its attached Memorandum of Law that the signing of the appeal request by Philip Mancini, Jr. was tantamount to practicing law without a license. No objection to the State's Motion has been filed.

Decision

The Administrative Adjudication Rules of Practice and Procedure promulgated in July 1990 set forth the requirements all parties must follow during the adjudicatory process. Copies of these rules can be obtained in the Clerk's Office.

Rule 8.00 of the Administrative Adjudication Rules of Practice and Procedure states that the non-moving party must file a timely objection to a motion submitted and provides that a failure to file an objection is deemed a waiver of that objection:

Presentation/Objection to Motions.

Motions may be made in writing at any time before, or after the commencement of a hearing, or they may be made orally during a hearing. Each motion shall set forth the

grounds for the desired order or action and state whether oral argument is requested. Within seven (7) days after a written motion is filed with the Administrative Adjudicatory Division or AHO, a party opposing said motion must file a written objection to the allowance of the motion and shall, if desired, request oral argument. All motions and objections shall be accompanied by a written memorandum, specifying the legal basis and support of the party's position. Failure to file a written objection within the prescribed time period, will be deemed a waiver of the objection (emphasis added).

In this matter the Respondent never filed an objection to the State's request. Since Rule 8.00 mandates an objection be filed or waived the Hearing Officer has no choice but to grant the State's motion to dismiss on procedural grounds. This motion is granted without prejudice.

Generally a motion granted on procedural grounds eliminates any need for this tribunal to engage in further review of the motion. However, the substantive arguments presented by DEM raise issues which have wide implications to motion practice in this forum. To avoid future motions presenting the same issues but evading review due to the dispositive nature of a procedural claim, the substantive issues presented in the State's motion will be addressed in this decision.

Request for Hearing

Requests for administrative adjudicatory hearings not properly or timely filed are not within the jurisdiction of AAD. Cumberland Park Homes, Inc., AAD # 91-017 (FWA appeal denied 11/14/91). The Department of Environmental Management has moved to dismiss Respondent's appeal arguing the Respondent's request for hearing is not timely and properly filed. In support of this

position the Department alleges only the Respondent or an attorney of record may make an appeal request.

The requirements for requesting an appeal of a notice of violation are set forth in R.I.G.L. 42-17.1-2 (u)(1). This statute states in pertinent part:

.... the notice shall provide for a time within which the alleged violation shall be remedied and shall inform the person to whom it is directed that a written request for a hearing on the alleged violation may be filed with the director within ten (10) days after service of the notice.

The Notice of Violation sent to Carol Anne Mancini reiterated the requirements for a request of hearing codified in the statute stating:

Pursuant to Section 42-17.1-2 (u)(1) of the General Laws of Rhode Island, 1956, 1984 Enactment, as amended, you are entitled to request a hearing before the director or his designee within ten (10) days of the service of this notice of violation as to Item 2 and 3 above. Any request for a hearing should, as required by Rhode Island General Law. Section 42-17.6-4, indicate whether you deny the alleged violations and whether you intend to assert the administrative penalty is excessive.

Similarly, AAD Rule 7.00 (A) Governing the Commencement of Adjudicatory Proceedings mimics the appeal procedures set forth in the the R.I.G.L. 42-17.1-2:

Any person having a right to request a hearing shall follow the procedures set forth in R.I.G.L. § 42-17.1-2 (u) and other applicable statutory and regulatory requirements. Such requests shall be sent directly to the Administrative Adjudication Division for Environmental Matters.

The Legislation, Notice of Violation and AAD Rules all mandate a specific time period to file a request for hearing but are devoid of any language

limiting the class of persons authorized to request an appeal.

Moreover, the Administrative Procedures Act (APA) R.I.G.L. 42-35-9 which establishes the notice and hearing requirements in all contested cases does not require a particular person request a hearing, but only mandates that "there be an opportunity for hearing after reasonable notice".

A review of the Respondent's letter requesting an appeal of the Notice of Violation shows that her request was filed well within the prescribed ten (10) day request period and appropriately stated the grounds for appeal. Therefore, absent any specific language in the statute or rules requiring the signature of an individual at the end of the request for hearing to be that of Respondent or her attorney the Respondent has fulfilled all requirements for a request for hearing necessitated in the applicable statutes and rules.

Unlawful Practice of Law

The State argues the actions of Mr. Philip Mancini constitutes the unlawful practice of law. If the State believes the signing of the request for hearing by Mr. Mancini is an incident of unlawful practice it has presented its case in the wrong forum. Administrative Adjudication Hearing Officers have limited jurisdiction and are solely empowered by the legislature to hear contested cases on environmental matters (R.I.G.L. 42-17.7). In a recent R.I. Supreme Court case Unauthorized Practice of Law Comm v. State of R.I. Workers Compensation et al 543 A2d 662 (1988), the Court found that employee assistants helping injured workers before an informal hearing board did not constitute the unlawful practice of law and

held that the Supreme Court has exclusive power under the R.I. Constitution to regulate the practice of law.

Conclusion

For the reasons stated above the State's Motion is GRANTED on procedural grounds without prejudice.

The Respondents's request for hearing is DISMISSED.

Patricia Byrnes

Patricia Byrnes
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, 4th Floor
Providence, RI 02908
(401) 277-1357

Entered as a Final Order on this 13th day of January, 1992.

1/13/92
Date

Louise Durfee
Louise Durfee
Director
Department of Environmental Management
9 Hayes Street
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision on the Department for Environmental Management's Motion to Dismiss to be forwarded regular mail, postage pre-paid to Carol Anne Mancini, 100 Council Rock Road, Cranston, RI 02921; Philip S. Mancini, Jr., P.E., Seven Twenty One Associates, 754 Branch Avenue, Providence, Rhode Island 02904; and via inter-office mail to Brian Wagner, Esq., Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908 on this 15th day of January, 1992.

Brian Wagner